2

The Ethos of Originalism

Mark A. Hannah and Francis J. Mootz III

We are all originalists

Solicitor General Elena Kagan (2010)

2.1 INTRODUCTION

Originalism has positioned itself as the *au courant* doctrine of legal interpretation in the United States. Proponents argue that originalism is a core element of our democratic identity and should be adopted by every judge. The originalist tenet[1] – that the meaning of a legal text is the ordinary meaning the text had when it was enacted – purportedly provides an objective basis for judging with integrity. Despite originalists' grandiose claims, critics have lodged many well-reasoned objections that problematize originalists' goals and methods (Chemerinsky, 2022; Mootz, 2017; Segall, 2018). Why, then, has originalism gained such widespread prominence? In this chapter, we offer a rhetorical analysis that explains its ascendence and strange persistence.

Our thesis is that originalists do not prevail primarily by persuading others through logic or dialectical reasoning (*logos*) or by promoting their audience's disposition to hear their argument (*pathos*). Instead, originalists bring force to their claims by establishing and projecting an *ethos*. They draw on ethos when claiming to be principled legal advocates who are persons of good character and wisdom. However, "ethos" has a broader scope than the speaker's reputation or character exhibited in an effort to persuade. Embracing "ethos" in its broadest sense reveals that *originalism* itself – distinct from its individual supporters – has an ethos in the form of a communal indwelling. Only by acknowledging this dimension of ethos can we explain how originalists have dominated recent jurisprudential debates.

[1] Originalism seemingly has morphed into as many iterations as there are theorists. Subtle differences among the various theorists are not relevant to our analysis of the ethos of originalism writ large.

The ethos of originalism is a dynamic social reality that has evolved over time. In Section 2.2, we reconceptualize "ethos" and recover its full meaning as developed by Martin Heidegger in his 1924 lectures on Aristotle. In Section 2.3, we describe the emergence of modern originalism in the work of Professor Raoul Berger and analyze his promotion of an ethos of originalism through proper acts of deference. In Section 2.4, we trace how Justice Antonin Scalia initially advanced the cause of originalism by narrowing its ethos of deference to a judicial model of rule-following. He later veered from originalism's cause when his writings eschewed deference in favor of performative, individually motivated reasoning, but his reliance on the ethos of indwelling remained. In Section 2.5, we contrast Scalia's efforts with those of Professor Lawrence Solum, the most prominent contemporary academic proponent of originalism. We demonstrate that, although more sophisticated and restrained than Scalia, Solum also relies on the ethos of indwelling to overcome originalism's deficiencies.

Berger, Scalia, and Solum did not secure a place of pride for originalism solely through the ethos of personal character and effective reasoning. Rather, we demonstrate that they succeeded by connecting their work to a deep-seated shared sense of communal identity. This demonstration is a critical starting point for developing effective critical interventions in future jurisprudential debates about the merits of originalism as a theory of legal meaning.

2.2 THE CONCEPT OF "ETHOS"

In the absence of compelling logical demonstration, Aristotle locates the power of persuasion primarily in the trust that the audience places in the speaker. Aristotle contends that the speaker can be deemed trustworthy in three ways (Aristotle, 2007, p. 112). First, the speaker may display personal excellence in the virtues (*arete*), such as courage, temperance, and fairness. Second, they might demonstrate practical wisdom in their argument (*phronesis*), such as by choosing apt metaphors and cogent analysis. Third, they may exhibit goodwill toward the audience (and the entire community) (*eunoia*), which is an ethical relationship of shared regard. The combination of these three elements constitutes the speaker's ethos. Logos and pathos are also forms of persuasion (*pisteis*) (Aristotle, 2007, p. 38), but Aristotle regards ethos as the most important because it looks beyond technique to the persuasion effected by the speaker as a person. As Gene Garver concludes, Aristotle ultimately regards rhetoric as "an art of character" (Garver, 1995). Ethos carries a weight that shapes future reasoning, which Garver explains with the concept of an "ethical surplus" (Garver, 2004, pp. 73–76). In practical reasoning, one is always committed to more than the logical entailments of one's position. For example, in *Brown v. Board of Education* (1954), the Court committed the nation to racial desegregation beyond the specific question of educational equity presented in the case (Garver, 2004, pp. 83–85). We explain this powerful amplification of ethos by drawing on Heidegger's reading of Aristotle.

2.2.1 *The Speaker's Display of Ethos:* Arete *and* Phronesis

"Ethos" often is loosely translated as the speaker's "character," with attention to how it affects the speaker's ability to persuade an audience. It is uncontroversial to suggest that an audience is more likely to trust the arguments of a person of high character. However, this limited sense of "ethos" as the speaker's pre-established *arete* fails to capture how that ethos operates in and beyond the rhetorical situation. One of Aristotle's advances was recognizing that ethos is evinced in the rhetorical act itself and not solely an antecedent fact about the speaker. This understanding that the speaker's manifestation of ethos is dual in nature is summarized by Quintilian's dictum that the ideal rhetor is a "good man speaking well." One's ethos as a trustworthy person is certainly augmented by one's ability to generate appropriate arguments in a case (Garver, 1995, p. 15). Ultimately, Aristotle contends that the speaker's ethos is revealed more by skill in practical reasoning than by virtue (Smith, 2004, p. 5).

2.2.2 *The Speaker's Participation in Communal Ethos:* Eunoia

This reading of Aristotle's definition of "ethos" is incomplete. There is a component of ethos that goes beyond the individual speaker and a particular argumentative challenge. In his 1924 lectures, Heidegger recuperated Aristotle's "hermeneutics of everydayness" as an exploration of the meaning-laden background resources that gird ethical thought and action (Hyde, 2004, pp. xvii–xx; McNeill, 2006, pp. 77–94). Heidegger characterizes "ethos" as an exhibition of virtue activated by deliberative activity that draws on shared fore-understandings in the moment, a thoroughly futural comportment toward action rather than a stable and preexisting capacity (McNeill, 2006, p. 95). This is the critical difference that Heidegger draws between *arete* as virtuous activity and *techne* as merely adapting one's established craft to particular circumstances.

Heidegger's key insight is that our pre-thinking existence with others generates the call of conscience that spurs deliberations about shared conceptions of the good (Hyde, 2004, p. xx). This dimension of ethos is a way of being in which we dwell rhetorically, drawing from a community's rhetorical resources to generate meaning but also being shaped by the community's fore-understandings before consciously developing arguments for a particular position. The goodwill described by *eunoia* is rooted in the ethical indwelling shared by the speaker and audience.[2]

[2] The principal text is Heidegger's famous lectures from the 1924 summer course on Aristotle (Heidegger, 2009). Heidegger reads the *Nicomachean Ethics* and the *Rhetoric* as phenomenological accounts of how we exist together prior to reflection, our dwelling together in speech. Heidegger emphasizes that living, "for the human being, means speaking" (Heidegger, 2009, p. 14) and there is an equiprimordiality of being with (*mitsein*) and speaking (p. 45). This deep shared dimension is the wellspring of rhetorical engagement, in that "Rhetoric is nothing other

We can render Heidegger's dense theorizing more accessible through several of his commentators. Walter Jost (2004, p. 75) connects this broad notion of "*ethos* as dwelling" to the "rhetorical places or topoi, more or less undefined terms, categories, cases, and the like useful for exploring . . . indeterminate practice problem[s]." Put differently, in Heidegger's "way of seeing things, [ethos] is not something that a rhetor uses, it is something that uses him" (Kenny, 2004, p. 36). Calvin Schrag (2004, p. vii) characterizes this broader conception of ethos as "a region of knowing and working together in advance of strategies to achieve consensus in the public forum." Viewed this way, ethos is "the dwelling or abode from which our communicative practices of entwined discourse and action take their rise and to which they return for their validations of sense and reference" (Schrag, 2004, p. vii). The ethos subtending a community is dynamic. Each rhetorical engagement not only draws on ethos, it also contributes to its evolution by creating a surplus for other community members to engage. A speaker has a personal ethos in the sense of demonstrated "character," but the speaker's character arises out of a shared ethos with the audience that provides the very possibility of having an individualized ethos. This is particularly true when a speaker seeks to motivate the audience to modify their practical reasoning and values. Accomplishing this is possible only by drawing from and embodying the discursive practices that constitute the communal ethos and then revealing to the audience a better "character" that exhibits the community's values in deliberation (Smith, 2004, p. 13).[3]

We use the concept of "ethos" in the full sense developed above. Originalists use ethos – construed as exhibiting good character and practical reasoning through deferring to the Framers' original intentions – to persuade others of the correctness of originalist methods. The speaker's character is general in that their audience already knows them as trustworthy, but their character is also developed and revealed in how they persuade. But ethos does not arise out of thin air, or simply by the speaker's force of will. Rather, the speaker's ethos is evinced through embodying the community's fore-understanding, namely its rhetorical commitments as represented in the values, topics, genres, and modes of argumentation that define the community and provide the resources for the exercise of practical wisdom. One cannot understand the power of ethos in persuasion without illuminating the constitutive effects of this indwelling.

than the interpretation of concrete being there, the hermeneutic of being-there itself" (p. 75). He concludes: "We are better off since we possess the Aristotelian *Rhetoric* rather than a philosophy of language. In the *Rhetoric* we have something before us that deals with speaking as a basic mode of the being-with-another of human beings themselves . . . [T]he *Rhetoric* gives access to this original phenomenon" (Heidegger, 2009, p. 80; see Canzonieri, 2017). Heidegger's *Being and Time* takes a more understated approach to *mitsein* as the primordial experience of understanding (Heidegger, 1996, pp. 116–126), but his *Letter on Humanism* continued this theme (Heidegger, 1977).

[3] Feminist scholars have also reassessed ethos as an abiding yet dynamic abode subtending the attribution of character according to a society's biases (Ryan et al., 2016a).

2.2.3 *An Example of Ethos as Communal Indwelling*

We illustrate these different senses of "ethos" by describing Martin Medhurst's (2004) argument that the country was not as rigidly divided during the 2000 presidential campaign as many assumed. He contends that the electorate shared Judeo-Christian values and sought a return to public spiritual values in the wake of the Clinton presidency. Medhurst traces the operation of ethos in the political debates at all three levels. First, Al Gore and George W. Bush both presented themselves as moral and upstanding men. Gore and his wife, Tipper, were widely admired as a loving couple. Bush had overcome alcoholism and other wayward behavior and offered himself as a committed Christian. Gore's running mate, Joe Lieberman, advertised he would be working for the American people "24/6," humorously using his devotion to the Sabbath to underscore his character. Moreover, the candidates demonstrated moral leadership by pitching their political arguments in respectful tones.

The ethos of the campaign was not limited to the candidates' characters or how they exercised practical reasoning. Both candidates also drew upon American citizens' deep belief in, and reverence for, the ideas embodied in American exceptionalism, that is, the principles of freedom, democracy, and the rule of law established at the nation's founding. Americans longed for virtuous leadership and spiritual renewal, and these desires were actualized through the candidates' dwelling within these principles. The candidates both tapped into and aligned their characters with this dimension (*eunoia*) of ethos, demonstrating a shared civic connection that was obscured by the campaigns' hurly-burly politicking. Medhurst argues that the campaign revealed "an ethos to our democracy – a dwelling place – that is shared across parties, across religions, across geography, across races, and even, to some extent, across ideologies" (Medhurst, 2004, p. 115). Medhurst illustrates how a complex ethos that begins in shared preunderstandings ultimately was reflected in the candidates' rhetorical practices, providing a model of our critical inquiry in this chapter. We apply this same heuristic to two of the "original" originalist thinkers, Professor Raoul Berger and Justice Antonin Scalia,[4] and one of its contemporary defenders, Professor Lawrence Solum.

2.3 RAOUL BERGER: ESTABLISHING DEFERENCE AS THE ETHOS OF ORIGINALISM

Professor Raoul Berger is widely credited with being originalism's first proponent. Berger worked in private and government practice and also as a law professor writing extensively on topics such as impeachment, executive privilege, and the death

[4] Robert Bork is generally regarded as a third "original" originalist, or perhaps the proto-originalist (see Bork, 1971, p. 7), and our analysis applies equally to him.

penalty. He is most well-known for his 1977 book *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Berger, 1997), in which he argues that constitutional interpretation must be constrained by the original intentions of the Framers who authored the US Constitution (Berger, 1997, p. 18). Berger wrote *Government by Judiciary* because he was deeply concerned by judicial revision of the Fourteenth Amendment (Berger, 1985–1986, p. 297). As an originalism manifesto (Segall, 2017, p. 47), *Government by Judiciary* clarified the basic contours of originalism (O'Neill, 2005, p. 131) through passionately calling for judges to restrain their work by deferring to text and original meaning rather than implementing evolving contemporary values (Segall, 2017, p. 47). The arc of Berger's theory lives on today through academic scholarship and judicial dicta commenting on its merits and limits. Some go so far as to argue that "almost everything being written, explicitly or implicitly, [about originalism] is a response to *Government by Judiciary*" (O'Neill, 2005, p. 131).

2.3.1 *Berger's Theory of Original Meaning*

Berger's originalism is traceable to his frustration with the activist decisions in the New Deal era that fundamentally altered the relationship between the state and the federal government (Presser, 2018). Berger did not want courts to be engines of progressive change, and he argued the Fourteenth Amendment's purpose was "merely to provide a Constitutional basis for the 1866 Civil Rights Act ... which was designed to guarantee that the newly freed Blacks would have the same rights to enforce contracts, to possess property, and to enjoy the security of life and limb as did whites" (para. 6). By exceeding this purpose, Berger argued that judges undermined traditional democratic and rule-of-law values.

Berger's conception of originalist argument is animated by the conviction that judges cannot revise the Constitution (Berger, 1997, p. 21) because it is the covenant that operates at the heart of American civil religion (p. 394) and is the bulwark of people's liberties (p. 321). Fealty to the Constitution runs deep in America, and Berger deeply respected the consent-based majoritarian nature of democratic systems (O'Neill, 2005, p. 112). Notably, he understood the Constitution as fundamental law that derived its obligatory force from the sovereignty of the people who ratified the Constitution. Berger believed the intentions of the sovereign people demanded obedience (Berger, 1997, p. 407) as people have the right to control their own destiny (p. 18). Encroaching on the Framers' intentions, which were an expression of the people's value choices (p. 301), thwarted this liberty.

Berger's advocacy for an interpretive method grounded in original meaning also displayed his commitment to the rule of law (Berger, 1997, p. 6). He insisted that we are bound to the Constitution and strict rules and precedents (p. 329) and asserted that "preestablished rules serve the requirements of certainty and predictability so

that people may conduct themselves accordingly" (p. 467). Perhaps the greatest rule to follow was the formal processes for amending the Constitution (p. 19). Berger characterized judicial discretion as an act of informal amendment that subordinated the law to judge's predilections and ultimately displaced the Framers' choices that expressed the people's will (p. 461). In undermining this will, jurists created conditions for rule by elites and experts rather than democratic self-governance.

To uphold democratic and rule-of-law values, Berger centered deference as foundational to originalist practice. Though Berger did not explicitly conceptualize his theory of originalism as deference, his advocacy clearly intimated the need for a yielding influence in judicial decision-making. For example, Berger believed deference hobbles the exercise of judicial power and thus short-circuits activists' opportunities to take advantage of the natural susceptibility of language (Berger, 1987–1988, p. 351). Importantly, such disabling ensures that judges merely expound and interpret the law and not make it (p. 351). Through its disabling work, deference establishes an objective critical practice that is immune to subjective disagreements about the merits of jurists' interpretive work. When done properly, deference legitimates originalist interpretation as credible, trustworthy, and loyal to the Framer's vision.

2.3.2 *Berger's Ethos as a Display of Character and Practical Reasoning*

Though Berger does not expressly claim to be a good man speaking well, he was widely regarded as a principled theorist, known for his temperance (in the sense of appropriate restraint), truthfulness, and keen sense of justice (in the sense of sustaining American democratic and rule-of-law principles) (see O'Neill, 2005). His work criticizing President Nixon's invocation of "executive privilege" during the Watergate crisis is representative of what it means for a legal advocate to work in a non-partisan manner, eschewing predilections for policy positions and standards of morality (Presser, 2018) in their decision-making. At times, Berger admittedly was irreverent (for example, his coining of phrases such as "judicial squatter sovereignty" (Berger, 1986–1987, p. 15) or "a cloud of post-Warren court euphoria" (Berger, 1997, p. 4), but at the heart of his projected character was an unmistakable quality of deference that turned on a profound well of respect for the Framers' articulation of constitutional rights.

Berger's virtue was put into question by his criticism of *Brown v. Board of Education* (1954). His display of character when criticizing the decision purported to be a principled approach to constitutional decision-making, such that he argued "intellectual honesty demands that the 'original understanding' be honored across the board" (Berger, 1997, p. 460) and that intellectual honesty in *Brown* requires that judges recognize that "the historical warrant for desegregation in the due process clause" is controversial (p. 7). In the face of overwhelming criticism, Berger reinforced his integrity by acknowledging he also held the political views of the

judicial activists seeing to advance racial justice.[5] Nevertheless, the rule of law demanded he cabin these personal views in deference to the law. Making this choice was difficult, as are all constitutional decisions involving core American values, and Berger evinced courage in making the "right" argument, something unprincipled Justices avoid when facing an unpalatable situation.

This tack was essential to Berger's appeal. As a historical matter, it is clear that originalism arose as a political theory for reversing the Warren Court advances rather than as a legal theory of argumentation (Greene, 2009a; TerBeek, 2021). Many who developed the political dimensions of originalism, such as Attorney General Edwin Meese, offered weak and partisan arguments to support their position. Berger's broader historical and political account sought to neutralize the racist underpinnings dedicated to undermining *Brown* by insisting that the rule of law had some regrettable effects that must be corrected legislatively.

Berger's display of character included a well-developed communal sensibility illustrated through his centering of the locus of power in a community's rhetorical commitments. Berger (1997, p. 52) recognized the "[Framers]' concern with the rights of the community rather than the individual." Honoring the Framers' communal concerns thus requires acts of self-abnegation, the sacrifice of one's predilections and morals that preserves the authority of the "we" and its values that were instantiated through ratification. Berger (1986, p. 14) understood the people have a fundamental right to rule themselves, and more importantly, that only they can revoke such authority. Not centering authority in the community creates the conditions that enable judges to upend and revoke that authority against the Framers' constitutional designs.

Like Aristotle, Berger understood that the ability to persuade an audience turns on more than a speaker's character and involves how the speaker makes their case. For originalism, this "how" dimension of ethos is cultivated by the speaker looking only to the meaning of the authoritative text when it was enacted, eschewing crude appeals to the audience's emotions or hubristic efforts to define the "just" rather than the "legal" result. Berger (1986–1987, p. 10) framed the "how" dimension of ethos as a problem of evidence and "always insisted on the test of empirical evidence in the written record as the only legitimate source of constitutional law" (O'Neill, 2005, p. 112). In *Government by Judiciary*, for example, he argued it "is necessary to pile proof on proof" (Berger, 1997, p. 9) to demonstrate the overwhelming nature of an appeal to original meaning. Berger criticized activists for ignoring these evidentiary demands, and, as a corrective, suggests three features of originalist arguments – temporality, textual integrity, and authorial reputation – that judges and legal advocates ought to advance.

[5] Though a lifelong liberal (Berger, 1987–1988, p. 352), Berger refused to pursue political goals out of concern it would corrupt his writings (Gangi, 1988, p. 802).

Berger's emphasis on original meaning demands that originalist argument be temporally attentive (Berger, 1985–1986, p. 321). In originalist thought, skillful argument relies on evidence close to the founding – "contemporaneous construction" – because it more accurately reflects the Framers' intentions (Berger, 1942, p. 625). It is not simply a matter of judges accepting a quantifiable expression of time, that is, texts written a certain number of years ago. Rather, judges use the time of a text's creation to identify the contours of the rhetorical context that confine their considerations of rhetorical factors like audiences, events, and constraints[6] in their arguments (Berger, 1997, p. 9).

Regarding textual integrity, Berger inhabited a procedural disposition shaped by well-defined guidelines for identifying and using appropriate texts. For example, Berger encouraged judges to use texts that had a stenographic quality (Berger, 1997, p. 7). Namely, he encouraged judges to draw from verbatim accounts developed during the time of an event's occurring, as statements made in those accounts counted as facts rather than opinion (p. 7). As facts, such evidence is free from the distortions of recollection and thus more reliable (p. 7). Berger also was highly critical of unprincipled citation practices. In particular, he argued judges should not have a free and easy way with texts and criticized any incompatibility between sources and their application (Berger, 1985–1986, p. 331). Implicated in Berger's concern with incompatibility is an understanding that there are appropriate genres for anchoring constitutional arguments. As an example, Berger describes the preservation of journals from the Convention that could be used to rebut false claims about the Framers' intentions (Berger, 1985–1986, p. 313). Ultimately, skillful textual practices establish a relationality that induces deference to dampen judges' speculative instincts to consider extralegal factors, like politics, which are at odds with the Framer's original intentions. Significantly, Berger makes room for judges to consider policy texts when historical texts run out (Berger, 1942, p. 637), and in acknowledging such potential, Berger bolstered his character as a credible advocate who recognized originalism's limits.

Concomitant with Berger's concern with textual integrity is the character of the authorial voice that establishes the original meaning of the Constitution's words, namely the voice of historical contemporaries and not modern theorists (Berger, 1997, p. 9). Berger deferred to trustworthy voices like Alexander Hamilton, James Madison, and other Framers (p. 427) whose words set the originalist community's boundaries. Relatedly, Berger deferred to the voices of Senators who signed the Fourteenth Amendment and recertified the democratic will of the citizenry to alter the Constitution (Berger, 1985–1986, p. 297). He was suspicious of scholarship animated by personal bias and how it undermined the pull of deference to the community voice instantiated through the Constitution's ratification (p. 323). To offset bias concerns, Berger insisted that the voice of competing arguments,

[6] For a discussion of the "rhetorical situation" in law, see Hannah and Salmon (2020).

represented by discrepant evidence and opposing inferences, be part of the evidentiary record for claims regarding the Framers' original understanding (Berger, 1997, p. 10).

2.3.3 *Berger's Resonance with Communal Ethos as Indwelling*

We interpret Berger's theory of original meaning coupled with his display of character and practical reasoning as emerging from a region of knowing (Schrag, 2004, pp. 4–5) shaped by the democratic and rule-of-law principles that defined the American legal community. In particular, his advocacy of deference was shaped by the ethos of indwelling that was behind and always already supporting his display of character and practical reasoning. The ethos of originalism's indwelling is a pre-thinking existence that operates in advance of argumentative strategies and exegetical claims. Berger's demonstration of communal sensibility along with his attention to issues of temporality, textual integrity, and authorial reputation embodied a persistent mode of deference that took its rise from the region of knowing and then came back for its validation through subsequent enactments of deference to original meaning.

Returning to Berger's willingness to jettison *Brown*, we can see that it was not fatal because it hewed closely to rule-of-law principles from which the conservative white majority wanted to draw to undo the civil rights ethos. By expressly putting his character into question, Berger's originalist argument regarding *Brown* evinced a principled argumentative approach that was – on its own terms, as a matter of logic – unassailable. He enacted a contextual sensibility by constraining his assessment to the parameters of *Brown* and not speculating about the decision's moral rightness. His approach was ensconced in the rule of law and aimed to preserve the ideal of democratic self-governance that subtended originalism's communal ethos. Berger's assessment of *Brown* establishes that originalism is inherently conservative and state centered. As we show next, Justice Scalia embodied and amplified this very nature through his originalist practice that drew from and was validated through originalism's indwelling ethos.

2.4 JUSTICE ANTONIN SCALIA: REVISING THE DEFERENTIAL ETHOS OF ORIGINALISM BY FOCUSING ON RULES THAT GENERATE CERTAINTY IN RESULTS

Berger successfully promoted originalist theory by projecting an ethos of deference to democratic rule. As an academic commentator, he succeeded in placing the topic at the center of jurisprudential debates. Ultimately, however, his ethos suffered when he declared that *Brown* was illegitimate. This abrasive disturbance of shared social values cast a dark shadow on his methodology. Deference to a fault with respect to *Brown* was unappealing to the vast majority of scholars, judges, and

lawyers, even those with originalist convictions. And yet, originalism still got off the ground, most famously through the jurisprudence of Justice Antonin Scalia. To avoid negative ethos, Justice Scalia paid scant scholarly attention to Berger's work and, like most originalists, contended that the result in *Brown* was consistent with his originalist methodology (Scalia & Garner, 2012, p. 88; see Calabresi & Perl, 2014). Nevertheless, Justice Scalia faced his own difficulties in maintaining ethos as a judge.

2.4.1 *Justice Scalia's Theory of Original Meaning*

Justice Scalia promoted originalism as the least problematic – but by no means perfect – method for promoting certainty and consistency in adjudication.[7] Early in his tenure on the Supreme Court he, like Berger, championed a practical theory of judicial self-restraint capable of constraining judges to defer to democratic rule. Unlike the case-by-case weighing of equities by common law judges, Justice Scalia argued that modern judges confronting binding legal texts must follow the rules established by democratically responsive government branches. His measured articulation of this approach is reasoned and pragmatic and therefore able to promote adherence through a strong ethos.

Similar to Berger's interest in strong empirical foundations, Justice Scalia argued that his commitment to following a statute's ordinary textual meaning provides an invariant, empirical foundation upon which binding rules may be established (Scalia, 1989a, pp. 1184–1185). Certainly, judges will exercise discretion to choose among several plausible rules, but this activity should be minimal if the judge is committed to defer to the statute's original meaning (pp. 1186–1187). Justice Scalia readily admits that originalism is imperfect, but he insists that the question

> is not whether originalism is perfect. … The question is whether it is better than anything else. … And that is not difficult. … The reality is that originalism is the only game in town – the only real, verifiable criterion that can prevent judges from making the Constitution say whatever they think it should say. … The living constitutionalist is a happy fella, because it turns out that the Constitution always means precisely what he thinks it ought to mean. (Scalia, 2017, pp. 210–212)

Originalism, then, is the "lesser evil" when compared to other jurisprudential approaches (Scalia, 1989b).

2.4.2 *Justice Scalia's Ethos as a Display of Character and Practical Reasoning*

Justice Scalia presents a measured and reasonable defense of adhering to the value of certainty to the extent possible, even while acknowledging the epistemic and

[7] This section draws heavily from Mootz (2019).

volitional obstacles to achieving complete adherence. He puts his faith in a jurisprudence of rules, grounded in the fixed, original understanding of the governing text, but he is astute enough to recognize we will fall short in our good-faith effort to follow this rigorous path. His point is a practical one. Non-originalists invite a wholesale failure of the judicial function, but realistic (faith-hearted and imperfect) originalists suffer only occasional concessions to human frailty while generally holding firm to rule-of-law values.

Justice Scalia's definition of originalism trumpets the virtue of judges who ignore the lure of power and defer to clear rules. Like Berger, he projects the image of a stalwart adherent to the rule of law who bravely overcomes his own all-too-human desire to effectuate justice on a case-by-case basis. He presents himself as a fallen angel trying to defer to legislative rules but acknowledging that he too, for his sins, will almost certainly write some opinions that rest on undisciplined weighing of incommensurable equities (Scalia, 1989a, pp. 1186–1187). A quick gloss of Scalia's words suggests he is a virtuous jurist aware of his limitations, yet the coy reference to himself as a fallen angel also intimates a desire to draw attention to himself. Through self-references like these, Scalia unwittingly laid the grounds for the undoing of his judicial character. Over time this undoing became a reality, as he became known for a communicative style characterized by florid prose and rhetorical excess (Shanske, 2019) which cuts at the heart of his presumably restrained and forthright judicial character.

Unlike Berger, Justice Scalia does not regard originalism as a truly attainable goal as much as an aspiration. Rather than hewing to a rigid philosophy, his ethos is one of practical attunement to the realities of judging, a sensibility Berger explicitly rejects. For example, Scalia readily accepted (undoubtedly with cases like *Brown* in mind) the virtue of *stare decisis* with his customary flourish: "The way I like to put it is: I am a textualist, I am an originalist. I am not a nut. You cannot go back and redo everything" (Scalia, 2015, p. 588). Though some argue that Scalia's originalist defense of *Brown* is so unpersuasive that it actually weakens his ethos (Turner, 2014), Scalia managed to project a strong ethos through humor, humility, and a sense of duty. He protects the rule of law not by wildly speculating about what the law ought to be but instead by constraining his work to what the law is.

Over time, though, Justice Scalia's ethos eroded as he became a visible proponent of a conservative political movement rather than a judge writing about, and employing, a distinctive interpretation theory (Segall, 2018, pp. 10–11). The tenor of his dissenting opinions and public speeches evidenced anger and intolerance that far exceeded Berger's occasional irreverence. In the string of gay rights cases authored by Justice Kennedy, Justice Scalia's intemperance spiraled out of control. He declared *Romer* "an act, not of judicial judgment but of political will" (*Romer v. Evans*, 1996, p. 653), *Lawrence* a "product of a Court . . . that has largely signed on to the so-called homosexual agenda" (*Lawrence v. Texas*, 2003, p. 2496), and *Obergefell* so bad that if he were to join the majority he would have to hide his

"head in a bag," given that it was written in the "mystical aphorisms of the fortune cookie" to veil a "Judicial Putsch" (*Obergefell v. Hodges*, 2015, pp. 718–719).

Beyond these cases, Scalia continued leveling searing critiques against the motives and honesty of other Justices (Mootz, 2019, p. 97 n. 2), thus making him seem more like a partisan political figure (Berman, 2017; Newman, 2006–2007, p. 909). Through his behavior, it was increasingly clear he no longer made difficult choices constrained by law's rhetorical commitments but instead expedient ones that merely served conservative goals. This perceived alignment between his legal positions and the conservative political movement cast a long shadow over his case for originalism and thereby pitted his jurisprudential ambitions at odds with the American vision of liberty, democracy, and rule of law that girded Berger's theorizing of originalism. Ultimately, rather than building consensus around his view of proper judicial deference, Justice Scalia's lack of virtue and character defects undoubtedly put off many scholars, originalist and non-originalist alike.

Notwithstanding his irascible personality, Justice Scalia garnered widespread attention for his jurisprudential methodology. Adhering to meaning that is fixed at the time of a text's enactment promises to convert legal questions into empirical historical inquiries that have a correct and determinable answer. Justice Scalia unremittingly takes up this task, seeking to persuade his readers that legal meaning stands apart from political calculation and policy implementation.

The primary appeal of originalism is that it can serve as a constraining method whose results can be reviewed objectively. Perhaps the best demonstration of the ethos of Justice Scalia's practical argumentation is found in his majority opinion in *District of Columbia v. Heller* (2008). In it, Justice Scalia looks to the stable, unchanging bedrock of historical fact as an anchor against profound changes in society since the founding. Disregarding the contentious debates among professional legal historians about the nature of historical knowledge given the inevitable hermeneutical character of understanding, he assumes that constitutional provisions have an unchanging meaning that is grounded in the historical understanding of the text when it was enacted. Consequently, he spends more than fifty pages crafting a thick citational web of sources to analyze the "meaning of the Second Amendment" before turning "finally to the law at issue here" (*District of Columbia v. Heller*, 2008, p. 628). His dense narrative confirming that the Amendment grants gun owners protection for self-defense purposes appears unassailable; by working with texts from the time of the Amendment's enactment, Scalia ostensibly was imbuing his analysis with a sense of temporal and textual integrity anchored in a strong empirical record. However, as Justice Stevens' dissent regarding the deeply disputed history of the Amendment makes clear, histories like the one developed in *Heller* are highly contested as a matter of both political theory and historical truth. As such, those histories can open the door to smuggling in the values that originalism sought to eliminate.

Scalia's originalist method accrues ethos by centering deference to minimize doubt and indeterminacy, yet his *actual performance* in *Heller* falls short. First, his

practical reasoning suffers from *hubris* in that he rarely recognizes the possibility that others may have insights into textual meaning that is not the product of originalist method. Furthermore, his "rhetoric of constitutional absolutism" rings hollow in the ears of those in the legal community who strive to balance incommensurable values and weakens the force of his argument (Berger, 2015). His aggressive method of judging in *Heller* (Segall, 2018, pp. 123–124, 140) also was rejected by many professional historians (pp. 143–144), and a failure to provide a convincing, empirically sound historical account is a failure at the core of originalist practice. Just as Justice Scalia's judicial character was highly suspect, so too his activity of practical reasoning was highly questionable.

2.4.3 *Scalia's Resonance with Communal Ethos as Indwelling*

Justice Scalia's originalism is part of a broader commitment to a norm of rule-following and institutional deference, as expressed by Berger, which compels judges to abstain from imposing their policy views and to adhere to democratically enacted laws. These commitments are deeply seated in democratic sentiments and corresponding principles of the separation of powers. Our assessment of the ethos of originalism as indwelling is buttressed by Eric Segall's (2018) characterization that originalism is more a matter of faith than a matter of reasoned deliberation about the best means for legal decision-making.

> Why was Scalia so effective advocating for a theory of constitutional interpretation he did not [in practice] adopt? The answer may be that originalism is not a theory of constitutional interpretation judges can effectively use to decide cases but a symbol, an article of faith, that links judicial review and the rule of law. (Segall, 2018, p. 183)

What binds the proponents of originalism is just "the faith that some combination of text, originalist-era evidence, and history can constrain Supreme Court decision-making (Segall, 2018, p. 193).[8] Our point is that this "faith" subtends the reasoned arguments about our practices as an affective feature of the indwelling that operates as an always already rhetorical force in constitutional interpretation.

John Manning explains Scalia's success promoting originalism in terms that fit our model. Manning argues that Scalia gained traction not through his personal ethos but because "his emphasis on standardless judicial discretion tapped into a preexisting, and deeply rooted, strain of American legal culture that aspires to

[8] Segall's metaphor is apt. In the Christian faith, "indwelling" is the presence of the Holy Spirit in the believer, a presence that empowers the person to be hermeneutically astute and discerning. Extending Segall's analysis of originalism as a matter of "faith," Benjamin Priester analogizes originalism to the kind of "fandom" that arises around iconic cultural events such as the Star Wars movies. Despite divisiveness and infighting about the "true" way to understand the franchise, the faithful are collectively committed to the claim that it expresses a universal and unchanging truth (Priester, 2021, pp. 37, 40).

judicial objectivity and constraint" (Manning, 2017, p. 771). His "anti-discretion principle reflects a persistent strain of thought in the American legal tradition" (p. 776), with "the aspiration to identify external legal constraints upon judging [continuing] to have a pull" (p. 778). Ironically, Manning notes, Scalia's deconstructive critique of judicial rhetoric was his great contribution to the cause, demonstrating that judges everywhere were arrogating discretion to themselves in their interpretive practices (pp. 779–781). In all of this, we recognize Scalia's opposition to judicial discretion, though in a markedly different tone, as furthering Berger's original lament. His tone led to the undoing of his personal character, but it reverberated with the American legal community's shared fore-understanding of values and modes of argumentation that gave shape to Berger's rhetoric of deference.

2.5 LAWRENCE SOLUM: GENERATING CERTAINTY IN JUDGING THROUGH THE FIXED MEANING OF LANGUAGE

Professor Berger's argument for a principled approach to constitutional decision-making that constrained judges set the stage for Justice Scalia to develop the judicial disposition of originalism, albeit with only a crude epistemological backing. Professor Lawrence Solum has been the most ardent and cogent defender of originalism as a correct hermeneutical theory of legal meaning, revisiting Berger's theory and Scalia's judicial practice in a sophisticated theoretical account that fully displays the ethos of originalism.

2.5.1 *Solum's Theory of Original Public Meaning*

There are many varieties of originalist theory, but most "contemporary originalists aim to recover the public meaning of the constitutional text at the time each provision was framed and ratified" (Solum, 2019, p. 1251). This definition seeks to avoid the problems raised by Berger's efforts to "discover" the intentions of the drafters.

> "Originalism" is a family of contemporary theories of constitutional interpretation and construction that share two core ideas. First, the communicative content of the constitutional text is fixed at the time each provision is framed and ratified – The Fixation Thesis. Second, constitutional practice should be constrained by that communicative content of the text, which we can call the "original public meaning" – The Constraint Principle. (Solum, 2017, p. 269; see also Solum, 2019, pp. 1270–1271)

Solum concedes there are different kinds of meaning, and he emphasizes he is interested only in the communicative (public) meaning of legal texts, as opposed to the drafters' intent or the purpose of the enactment (Solum, 2015, pp. 20–21; see also 2013a, p. 479). By focusing on fixed communicative meaning, Solum narrows the interpretive field and achieves certainty despite the "linguistic drift" of meaning over

time (Solum, 2015, pp. 62–63). For example, a constitutional reference to "domestic violence" has a fixed meaning from the time of the founding that differs from the meaning the phrase might have today (US Constitution, art. IV, sec. 4).

Why is original public meaning the necessary touchstone for legal interpretation? Solum asserts that, from "the very beginning, American constitutional jurisprudence has recognized that the meaning of the constitutional text does not change" (Solum, 2018, p. 237). The normative obligation of judges to defer to the text's fixed meaning rather than enforce their own preferences is assumed rather than argued. Having identified a source of fixed meaning, it follows that the constraint principle will restrain judges from contradicting or exceeding that meaning. Critics object that historians do not take such a simplistic view of the past, but Solum emphasizes that uncovering the fixed communicative meaning of a text does not entail the same difficulties that professional historians encounter, inasmuch as they have competing objectives beyond recuperating communicative meaning.[9] In short, if "originalists are right about the Constraint Principle, then the truth of the Fixation Thesis should have important implications for constitutional practice" because it is the only plausible source for that constraint (Solum, 2015, p. 78).

Solum does not adequately account for the epistemological and motivational difficulties of judging. The Fixation Thesis does not ensure that the fixed meaning is pellucid, nor is the conversational meaning self-executing in a manner that definitively resolves interpretative problems. Judges begin with the original meaning of the text and then "construct" a result in the case at hand in line with a variety of judicial norms. Applying a text to a specific controversy requires judgment and the construction of a legal rule (Solum, 2010, 2013b). Even if the fixed linguistic meaning is clear, the judge must often engage in contemporary assessment of the legal rule for a case, working within what Solum calls the "construction zone." The construction zone is both "ubiquitous" and "ineliminable" in judicial practice (Solum, 2013b, p. 516).

To Solum's credit, he doesn't dodge the instability inherent in the trilogy of fixed meaning, the normative justification of constraint, and the practical necessity for construction. Because he fails to resolve these tensions, he roots his theoretical construct with a diverse ethos that strives to compensate for the weakness of his logos.

2.5.2 *Solum's Ethos as a Display of Character and Practical Reasoning*

Solum writes in a neutral scholarly voice that defends his position based wholly on the cogency of his arguments. Although he does not expressly invoke his character,

[9] Solum notes that many historians have other concerns, including inquiries into the motives and purposes of constitutional actors, the construction of constitutional narratives that illuminate the causal processes that explain constitutionally salient events, and tracing the development of constitutional ideas over time. These inquiries intersect with originalist inquiry, but they are sometimes orthogonal to the central aim of originalism – the recovery of the original public meaning of the constitutional text (Solum, 2017, p. 292).

Solum does make an implicit appeal along these lines. First, he carefully circumscribes the scope of inquiry by admitting that defining originalism is an ongoing task he doesn't claim to have fully achieved. Solum often notes that applications of his theoretical claims must "wait another day," because they would require "deep and comprehensive research" (Solum, 2015, pp. 29, 70, 75). More important, he never claims to provide a complete analysis of a single legal dispute using originalist methodology (Solum, 2018, p. 237). With abundant humility, like early Justice Scalia, he claims only to be clarifying the conceptual terrain so as to provide a *lingua franca* for continuing jurisprudential debates (Solum, 2013a, pp. 518–519, 2013b, p. 536, 2019, p. 1296).

Solum's restrained claims are most apparent in his review of Jack Balkin's effort to link originalism with progressive politics and judicial practices. In various works, Balkin has argued that we can reconcile the original understanding of legal texts with efforts to apply them so as to overcome the Framers' limited vision (Balkin, 2011a, 2011b). Balkin suggests that the meaning of the text provides some measure of constraint on the elaboration of constitutional principles in a progressive manner. Balkin thereby combines fidelity to a fixed meaning with faith in redemptive judicial practices. This appears to put the theory at war with itself, precisely the kind of uncertainty that originalism is supposed to preclude (Solum, 2012, p. 162).

In response, Solum argues that courts are not bound by original meaning when they are operating in the "construction zone" to elaborate on vague or ambiguous terms. Thus, it is possible to assimilate the living constitutional method of construction with the fixation thesis of meaning, without engaging in a logical error. But this expansion must be duly circumscribed if it is not to undermine originalism. Solum indicts Balkin for embracing Philip Bobbit's (CITE) modes of argumentation without scrupulously distinguishing the modes for finding the text's fixed meaning from those that can be used only in the "construction zone" in the absence of a controlling fixed meaning.

> There may be special cases of irreducible ambiguity – where resort to context is insufficient to yield clear communicative content. In those special cases, we are in the construction zone, and originalists might concede that [Bobbitt's approaches of] precedent, ethos, and consequences are relevant. (This will depend on one's theory of constitutional construction – a topic outside the scope of this essay.) (Solum, 2012, p. 171)

Living constitutionalism may well be an appropriate strategy for legal construction, but one must steadfastly resolve not to collapse the initial inquiry into fixed meaning into an unguided "construction" of opaque provisions to address the case at hand. Solum concludes that Balkin ultimately must "face squarely the central dilemma of contemporary constitutional theory. If faith in constitutional redemption cannot be reconciled with fidelity to constitutional text, then which shall

yield?" (Solum, 2012, p. 173). Solum encourages scholars to reject the appeal of progressive construction that threatens to eviscerate the constraining effect of fixed meaning. As a practical matter, Solum understood there is no way to avoid this slippage, other than fidelity to original meaning whenever it can be discerned and applied. Solum rejects the lure of becoming a philosopher king who heroically pronounces the appropriate constitutional doctrine, claiming for himself a small role in preserving democratic and rule-of-law values.

The nature of Solum's argumentation also evinces ethos. Like Berger, he is nonpartisan and does not argue in favor of any particular conception of constitutional law. Rather, he is committed to uncovering original meaning to serve as an independent constraint on judging that produces both liberal and conservative results (Solum, 2018). Thus, a self-effacing judge or scholar truly constrained by the original meaning should sometimes be surprised by the applicable rule provided by the fixed meaning.

Moreover, Solum consistently defers analysis of particular disputes. Unlike Justice Scalia, operating under the time constraints of appellate litigation in deciding *Heller*, Solum can sketch a method that appears objective in nature but is never fully put to the test of resolving an actual legal dispute. This clever approach makes it difficult to challenge originalism as practiced rather than as conceived. Interestingly, though, Solum feels the need to make the case that *Brown* might be justified by originalist method, recognizing that a "large question is raised" if the canonical *Brown* can't be accommodated by one's theory (Solum, 2018, pp. 259–260). Solum argues that an originalist understanding of the Privileges and Immunities Clause might provide justification for *Brown* that is difficult to sustain under the original meaning of the Equal Protection Clause. Resisting the need to speculate about the drafters' expectations of how the text would be interpreted, Solum favors the original meaning of the Privileges and Immunities Clause as being more protective (Solum, 2018, pp. 265–266). Of course, Solum does not put himself at risk by making the full argument regarding *Brown*'s legitimacy.

Finally, Solum's practical reasoning is expressly pragmatic. Because some believe that justice would be improved by moving beyond original textual meanings, Solum appeals to the idea of originalism as a compromise rather than vacillating between "liberal" and "conservative" courts by endorsing originalism and the sometimes surprising results it produces (Solum, 2018, pp. 270–272). People across the political spectrum sometimes will see their political positions adopted by the Court if decision-making is driven by fixed meaning with varying applications rather than substantive political positions. "An originalist jurisprudence would lead to a mix of outcomes – conservative, liberal, progressive, and libertarian – if the original meaning of the constitution were fully implemented" (Solum, 2018, p. 277). This pragmatism resonates with Berger's insistence that practical legal reasoning should not be filtered through a single political perspective.

2.5.3 *Solum's Resonance with Communal Ethos as Indwelling*

There is a sense in which originalism is so foundational to preserving the ideals of American democracy and its rule-of-law commitments that it is immune from critique. Thus, Justice Kagan "surrenders" to the reality, and perhaps even the perceived necessity, that today we are all originalists. As Eric Segall (2018) summarizes, drawing from Solum's testimony in connection with Judge Neil Gorsuch's nomination to the Supreme Court, the defense of originalism appeals to universal values that deeply inform our understanding even before we begin to make specific arguments.

> Professor Solum ended his testimony with the following statement: "The whole idea of the originalist project is to take politics and ideology out of law. Democrats and Republicans, progressives and conservatives, liberals and libertarians – we should all agree that the Supreme Court Justices should be selected for their dedication to the rule of law." This idea, that only originalism can make judging and judicial review consistent with the rule of law, and that only originalism can "take politics and ideology" out of the Supreme Court are constant refrains of many originalists. (Segall, 2018, p. 176)

Although these grand claims are not realized in judicial practice, "originalism as a brand is selling better today than ever before" precisely because it resonates with these deep values that are a matter of our constitutive civic "faith" rather than the product of reason (Segall, 2018, p. 185).

Our characterization of the ethos of originalism as indwelling best explains the "faith" that supports originalism's continuing influence.[10] Interestingly, Solum directly addresses the indwelling ethos when arguing against Bobbit's "ethical" mode of constitutional argumentation that looks beyond the Constitution's text.

> Nonconstitutional texts might serve as evidence of what Philip Bobbitt calls "ethos," the shared values of the American people. Some constitutional theorists may believe that such values trump the communicative content of the constitutional text, but the constraint principle commits originalists to the view that ethos can play only a supplementary role. Deploying the terminology of the interpretation–construction distinction, ethos (as evidenced by canonical nonconstitutional texts)

[10] Jamal Greene offers a similar explanation of originalism's success, developing an account of the "*ethos* of originalism" in terms of the modalities of constitutional argument described by Philip Bobbit (Greene, 2009a). He concludes that the "success of originalism results not from its penetrable logic but from its consistency with a political morality defended most ardently by originalism's opponents . . . In short, many non-originalist theoretical models need not only to acknowledge, but also to accommodate the success of originalism as a political practice" (Greene, 2009b, pp. 695, 701). We write in the spirit of Greene's critique, although we develop ethos as indwelling in expressly rhetorical terms. The ethos of originalism is more than a canny use of political manipulation, which is why it is not so easily identified and overcome.

> could guide constitutional actors in the construction zone – but would have no direct relevance to constitutional interpretation. (Solum, 2013c, pp. 1974–1975)

Solum regards ethos as a concession to the necessity for construction and does not understand how much his theory is underwritten by implicit appeals to a pre-argumentative ethos of deference. More specifically, he concerns himself only with those contemporary values operating in the construction zone while simultaneously ignoring the shared values animating the will of the people instantiated through ratification.

2.6 CONCLUSION

The success of originalist theory and its apparent staying power is explained by its ethos. Not the individual ethos projected by Justice Scalia and Professors Berger and Solum through a demonstration of their character and reasoning, but rather the communal ethos that they were able to invoke and draw from as a rhetorical well of prejudgments and commitments. We offer this conclusion not only as an explanation of how originalism could succeed against the odds with such weak logos and personal ethos but also as a first step in explaining how critics of originalism must respond if they hope to be effective in jurisprudential debates. Put simply, critics can overcome an argument deeply rooted in an ethos of indwelling only by offering a counterargument that is rooted in an alternative indwelling.

Unfortunately, we have an all too vivid example of the challenges facing those who seek to argue against originalism. Donald Trump was popular enough to win the US presidency despite what should clearly have been disqualifying traits. The ethos exhibited in his character and argumentation was wholly negative by any reasonable account. And yet, he won the presidency with fervent followers who found his appeal compelling. Tapping into dimensions of our dwelling together in meaning – American exceptionalism, national security, racial protectionism, and anti-elitism, to name a few features – Trump tapped into a strong ethos of indwelling to overcome his substantial personal deficits. His critics continually failed to understand that pointing out his personal flaws or his warped reasoning was utterly beside the point. The real battleground was the marshalling of the communal ethos to point to a particular political expression of our deepest values (or, more accurately in this case, an expression of our deepest fears).

A rhetorical analysis of the success of originalism by three of its most notable proponents reveals that ethos has secured the apparent temporary victory. To effectively respond, originalist critics must also draw from our communal indwelling without pretending to render it fully present as a logically compelling argument. Indwelling supports and sustains our thinking; it is not a subject we can take up at arm's length and use like a tool. Without engaging in rhetoric at this deep level, critics cannot hope to counter originalism's force.

We now return to the testimony of then-Solicitor-General Kagan that "we are all originalists." She felt compelled to make this concession because it was unthinkable to reject the constraints provided by originalist theory through its insistence on deference to democratic and rule-of-law values. But, her testimony was not a capitulation to Justice Scalia's opportunistic use of originalism to secure conservative results. Instead, she found in "original understanding" a confirmation of the dynamic character of the Constitution and its commitments to sustaining the Framers' choices that expressed the people's will. Consider her testimony in its broader context:

> [T]he Framers were incredibly wise men, and if we always remember that, we will do pretty well, because part of their wisdom was that they wrote a Constitution for the ages. And this was very much in their mind. This was part of their consciousness. . . . They were looking generations and generations and generations ahead and knowing that they were writing a Constitution for all that period of time, and that circumstances and that the world would change, just as it had changed in their own lives very dramatically. So, they knew all about change. . . . And I think that they laid down – sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So, in that sense, we are all originalists. (Kagan, 2010, pp. 61–62)

Originalism is neither the question nor the answer. What originalism means, what values it calls forth in support of our polity, is the issue at hand.

We now briefly outline strategies for confronting ethos as indwelling to prop up originalist arguments. Indwelling is precognitive; it is best understood as operating at the level of the symbolic realm, rather than as a discursive elaboration of a cognitive capacity (Arnold, 1962). Gene Garver's concept of "ethical surplus" explains the rhetorical logic at work in the reference to ethos as indwelling and provides insight into how we can generate persuasive critiques of originalism.[11]

The foundational symbols that structure our shared indwelling are polysemic and non-discursive. Moreover, these symbols are in tension with each other. Exploiting the ambiguities in the symbolic realm is the only realistic manner to challenge the originalist ethos. Originalists have particularly focused on our shared commitment to certainty, objectivity, and univocity in the exposition of law, anchoring arguments to support originalism that otherwise would be susceptible to criticisms. Critics should begin by linking their arguments to these same principles.

Perhaps the single most important strategy is to connect certainty and objectivity with a need for judicial transparency. Arguing against the fantasy of semantic univocity, critics should adopt Karl Llewellyn's theory that the law becomes more certain when it is less technical and participates in the shared values of the

[11] For a more expansive analysis of how "ethical surplus" provides a critical purchase on the rhetoric of the "war on immigration," see Mootz and Saucedo (2012).

community.[12] The availability of a plurality of approaches for resolving a particular interpretive question is not problematic if the decision-maker engages in practical reasoning honestly and in good faith. Critics can thus unite the three elements of ethos. Justice Kennedy's approach in the "gay rights" cases evinces the kind of reasonable development over time that demonstrates the operation of ethical surplus and is not merely a matter of the Justice's subjective will. Indeed, in *Lawrence*, Justice Scalia expressed his concern that the "ethical surplus" of Justice Kennedy's reasoning in *Lawrence* would almost certainly unfold and result in *Obergefell*.[13] Ironically, by this prediction, Justice Scalia proves the case that non-originalist legal reasoning generates some degree of "certainty."

Our brief outline of how ethos as indwelling should power the critique of originalism is not unprecedented. A number of scholars have pursued some of these strategies, and we have discussed several examples in this chapter. The essential point is that the criticisms don't take hold to the extent that they focus on the ethos of the speaker's characteristics, rather than focusing on the ethos of indwelling. Using ancient Greek understandings of persuasion through ethos, we are better positioned to develop more specific strategies that rebut the ethos of originalism when the interpretive theory is advanced in an unprincipled manner.

REFERENCES

Aristotle. (2007). *On rhetoric: A theory of civic discourse* (G. A. Kennedy, Trans.). Oxford University Press. (Original work published fourth century BCE.)

Arnold, T. W. (1962). *The symbols of government* (Harbinger ed.). Harcourt, Brace and World. (Original work published 1935.)

Balkin, J. M. (2011a). *Constitutional redemption: Political faith in an unjust world*. Harvard University Press.

(2011b). *Living originalism*. Harvard University Press.

Berger, E. (2015). The rhetoric of constitutional absolutism. *William & Mary Law Review*, *56*(33), 667–757.

Berger, R. (1942). Constructive contempt: A post-mortem. *University of Chicago Law Review*, *9*(4), 602–642.

[12] For example, in his famous article on the "dueling canons" of statutory interpretation Llewellyn (1950) argued that the availability of multiple arguments about meaning does not impair the consistent development of the law through reasoned elaboration. Legal practice is consistent and predictable because the "construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a *simple* construction of the available language to achieve that sense, *by tenable means, out of the statutory language*" (Llewellyn, 1950, p. 401).

[13] In response to Justice Kennedy's assurances that the decriminalization of gay sex in *Lawrence* did not undermine all manner of "morals legislation," Justice Scalia responded with scorn (*Lawrence*, 2003, p. 586). He concluded his dissent by arguing that this "case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court" (*Lawrence*, 2003, p. 605).

(1985–1986). Original intention in historical perspective. *George Washington Law Review*, *54*(2–3), 296–337.
(1986). New theories of interpretation: The activist flight from the constitution. *Ohio State Law Journal*, *47*(1), 1–46.
(1986–1987). Some reflections on interpretivism. *George Washington Law Review*, *55*(1), 1–15.
(1987–1988). Originalist theories of constitutional interpretation. *Cornell Law Review*, *73*(2), 350–358.
(1997). *Government by judiciary: The transforming of the Fourteenth Amendment* (2nd ed.). Liberty Fund. (Original work published 1977.)
Berman, M. N. (2017). The tragedy of Justice Scalia. *Michigan Law Review*, *115*(6), 783–808.
Bobbitt, P. C. (1989). Methods of constitutional argument. *University of British Columbia Law Review*, *23*, 449–458.
Bork, R. H. (1971). Neutral principles and some First Amendment problems. *Indiana Law Journal*, *47*(1), 1–35.
Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
Calabresi, S. G., & Perl, M. W. (2014). Originalism and *Brown v.* Board of Education. *Michigan State Law Review*, *2014*(3), 429–552.
Canzonieri, A. (2017). Heidegger on rhetorical language: The 1924 lecture course on the "Basic Concepts of Aristotelian Philosophy." *Logoi.ph – Journal of Philosophy – N*, *3*(9), 236–246.
Chemerinsky, E. (2022). *Worse than nothing: The dangerous fallacy of originalism*. Yale University Press.
District of Columbia v. Heller, 554 U.S. 570 (2008).
Gangi, W. (1988). On Raoul Berger's federalism. *Law & Social Inquiry*, *13*(4), 801–823.
Garver, E. (1995). *Aristotle's Rhetoric: An art of character*. University of Chicago Press.
(2004). *For the sake of argument: Practical reasoning, character and the ethics of belief*. University of Chicago Press.
Greene, J. (2009a). On the origins of originalism. *Texas Law Review*, *88*(1), 3–89.
(2009b). Selling originalism. *Georgetown Law Review*, *97*(3), 657–721.
Hannah, M. A., & Salmon, S. (2020). Against the grain: The secret role of dissents in integrating rhetoric across the curriculum. *Nevada Law Journal*, *20*(3), 935–966.
Heidegger, M. (1977). Letter on humanism. In D. F. Krell (Ed.), *Basic writings* (pp. 190–242). Harper and Row.
(1996). *Being and time* (J. Stambaugh, Trans.). State University of New York Press.
(2009). *Basic concepts of Aristotelian philosophy* (R. D. Metcalf & M. B. Tanzer, Trans.). Indiana University Press.
Hyde, M. J. (2004). Introduction: Rhetorically, we dwell. In M. J. Hyde (Ed.), *The ethos of rhetoric* (pp. xiii–xxviii). University of South Carolina Press.
Jost, W. (2004). Sweating the little things in Sidney Lumet's 12 Angry Men. In M. J. Hyde (Ed.), *The ethos of rhetoric* (pp. 75–88). University of South Carolina Press.
Kagan, E. (2010, June 29). The nomination of Elena Kagan to be an associate justice of the Supreme Court of the United States. *Senate Hearing 111-1044: Hearing before the Committee on the Judiciary, United States Senate, One Hundredth Eleventh Congress*. 2nd Session.
Kenny, R. W. (2004). Truth as metaphor: Imaginary vision and the *ethos* of rhetoric. In M. J. Hyde (Ed.), *The ethos of rhetoric* (pp. 34–55). University of South Carolina Press.
Lawrence v. Texas, 539 U.S. 558 (2003).
Llewellyn, K. N. (1950). Remarks on the theory of appellate decision and the rules or canons about how statutes are to be construed. *Vanderbilt Law Review*, *3*(3), 395–405.

Manning, J. F. (2017). Justice Scalia and the idea of judicial restraint. *Michigan Law Review*, *115*(6), 747–782.
McNeill, W. (2006). *The time of life: Heidegger and ethos*. State University of New York Press.
Medhurst, M. J. (2004). Religious rhetoric and the *ethos* of democracy: A case study of the 2000 presidential campaign. In M. J. Hyde (Ed.), *The ethos of rhetoric* (pp. 114–135). University of South Carolina Press.
Mootz, F. J., III. (2017). Getting over the originalist fixation. In B. G. Slocum (Ed.), *The nature of legal interpretation: What jurists can learn about legal interpretation from linguistics and philosophy* (pp. 156–190). University of Chicago Press.
(2019). Party like it's 1989: Justice Scalia's rhetoric of certainty. In B. G. Slocum & F. J. Mootz III (Eds.), *Justice Scalia: Rhetoric and the rule of law* (pp. 97–110). University of Chicago Press.
Mootz, F. J., III & Saucedo, L. M. (2012). The "ethical" surplus of the war on illegal immigration. *Journal of Gender, Race & Justice*, *15*(2), 257–279.
Newman, S. A. (2006–2007). Political advocacy on the Supreme Court: The damaging rhetoric of Antonin Scalia. *New York Law School Law Review*, *51*(4), 908–926.
Obergefell v. Hodges, 516 U.S. 644 (2015).
O'Neill, J. (2005). *Originalism in American law and politics: A constitutional history*. Johns Hopkins University Press.
Presser, S. (2018, May 15). The coming resurrection of Raoul Berger? A remembrance of *Government by Judiciary*. Last modified May 15, 2018. https://perma.cc/4N3H-Q8HG
Priester, B. J. (2021). Is originalism a fandom? http://dx.doi.org/10.2139/ssrn.3775043.
Romer v. Evans, 517 U.S. 620 (1996).
Ryan, K. J., Myers, N., & Jones, R. (Eds.). (2016a). *Rethinking ethos: A feminist ecological approach to rhetoric*. Southern Illinois University Press.
Scalia, A. (1989a). The rule of law as a law of rules. *University of Chicago Law Review*, *56*(4), 1175–1188.
(1989b). Originalism: The lesser evil. *University of Cincinnati Law Review*, *57*(3), 849–865.
(2015). A look back: 1994 William O. Douglas lecture series transcript. *Gonzaga Law Review*, *51*(3), 583–600.
(2017). *Scalia speaks: Reflections on law, faith, and life well lived* (C. J. Scalia & E. Whelan, Eds.). Crown Forum.
Scalia, A., & Garner, B. A. (2012). *Reading law: The interpretation of legal texts*.Thomson/West Publishing.
Schrag, C. O. (2004). Foreword. In M. J. Hyde (Ed.), *The ethos of rhetoric* (pp. vii–viii). University of South Carolina Press.
Segall, E. J. (2017). Judicial engagement, new originalism, and the fortieth anniversary of *Government by Judiciary*. *Fordham Law Review Online*, *86*, 47–58.
(2018). *Originalism as faith*. Cambridge University Press.
Shanske, D. (2019). Rhetoric, jurisprudence, and the case of Justice Scalia: Or, why did Justice Scalia of all judges write like that? In B. G. Slocum & F. J. Mootz III (Eds.), *Justice Scalia: Rhetoric and the rule of law* (pp. 123–135). University of Chicago Press.
Smith, C. R. (2004). *Ethos* dwells pervasively: A hermeneutic reading of Aristotle on credibility. In M. J. Hyde (Ed.), *The ethos of rhetoric* (pp. 1–19). University of South Carolina Press.
Solum, L. B. (2010). The interpretation–construction distinction. *Constitutional Commentary*, *27*(1), 95–118.
(2012). Faith and fidelity: Originalism and the possibility of constitutional redemption. *Texas Law Review*, *91*(147), 147–173.

(2013a). Communicative content and legal content. *Notre Dame Law Review*, 89(2), 479–519.
(2013b). Originalism and constitutional construction. *Fordham Law Review*, 82(2), 453–537.
(2013c). Originalism and the unwritten constitution. *Illinois Law Review*, 2013(5), 1935–1984.
(2015). The fixation thesis: The role of historical fact in original meaning. *Notre Dame Law Review*, 91(1), 1–78.
(2017). Originalist methodology. *University of Chicago Law Review*, 84(1), 269–295.
(2018). Surprising originalism: The Regula lecture. *ConlawNOW*, 9, 235–277.
(2019). Originalism versus living constitutionalism: The conceptual structure of the great debate. *Northwestern University Law Review*, 113(6), 1243–1296.
TerBeek, C. (2021). "Clocks must always be turned back," *Brown v. Board of Education* and the racial origins of constitutional originalism. *American Political Science Review*, 115(3), 821–834.
Turner, R. (2014). A critique of Justice Antonin Scalia's originalist defense of *Brown v. Board of Education*. *UCLA Law Review Discourse*, 62, 170–184.